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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HARRY BENION and PATRICIA BENION,

Petitioners,

v.

BANK ONE, DAYTON, N.A.; ECHO ACCEPTANCE CORPORATION; and SUPERIOR SATELLITE, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

On August 19, 1998, petitioners Harry Benion and Patricia Benion filed a petition for writ of certiorari seeking review of the Seventh Circuit's opinion in *Benion v. Bank One*, 144 F.3d 1056 (7th Cir. 1998). On September 28, 1998, respondents Bank One, Dayton, N.A. and Echo Acceptance Corporation presented their response in opposition to the petition. Respondent Superior Satellite, Inc. waived its response.

As shown below, respondents failed to address the legal arguments that underlie the Benions' petition. As such, they have failed to present any reason why the petition should not be granted.

ARGUMENT

I. THE SEVENTH CIRCUIT DEFIED THE STATUTORY AND REGULATORY SCHEME CREATED BY CONGRESS AND THE FEDERAL RESERVE BOARD.

The Seventh Circuit rejected the statutory and regulatory plan for determining compliance with open-end credit that Congress and the Federal Reserve Board jointly developed. This rejection is the basis of the Benions' petition.

When the Seventh Circuit undertook to hear the Benions' Truth in Lending Act claim, it was mandated by Congress and the FRB to apply a comprehensive "reasonableness" test set forth in the statute, the implementing regulations, and the staff commentary. 18 U.S.C. §§1602(a), 1637, 1638; 12 C.F.R. §226.2(a)(20); Federal Reserve Board Official Staff Commentary on Regulation Z, Comments to §226.2(a)(20).

The Seventh Circuit was also required to consider the *substance* of the Benions' transaction, rather than just the form, when deciding whether respondents complied with TILA. *Ford Motor Credit Co. v. Cenace*, 452 U.S. 155, 156 (1981).

The Seventh Circuit did not follow these directives. Rather, it parried the question of whether the Benions' transaction violated TILA *back to the FRB*. After finding that it would be an abuse of TILA for a creditor to sell a big-ticket item like a car using open-end credit disclosures, the Seventh Circuit stated:

> [I]f the Board cannot formulate such a rule in the exercise of its expert administrative discretion, we surely cannot formulate it as a matter of statutory interpretation.

App. 5-6.

The Seventh Circuit misunderstood its job: Congress and the FRB *explicitly declined* to produce a bright-line test, preferring instead to require courts to look at the nature and purpose of each transaction. The nature and purpose of respondents' decision to sell a one-time, big-ticket item like a satellite dish via a revolving credit account was to hide the total number of payments the Benions would make and conceal the total amount of interest they would pay. Without this information, the Benions were much more likely to (and did) purchase the dish.

The Seventh Circuit's abdication of responsibility by sending the issue back to the FRB, despite the fact that the FRB already instructed courts to apply a reasonableness test, is impermissible and constitutes the basis of this petition for certiorari.

II. RESPONDENTS DO NOT ARTICULATE ANY REASON TO DENY THE PETITION.

As is commonly the case, respondents attempt to portray the issues in the Benions' petition as routine, fact-driven and unremarkable. Respondents' brief is largely composed of page after page of factual analysis from both the District Court and Seventh Circuit opinions.

That the lower courts examined the facts on the record is hardly surprising, since the case was decided on a motion for summary judgment. The Benions do not dispute the fact that both lower courts assessed the evidentiary record and applied a legal standard. Rather, the Benions contend that *the legal standard used by the Seventh Circuit was wrong*.

In fact, it was not a legal standard at all—under it, every single case involving the financing of a big-ticket item under open-end credit terms would comply with TILA as long as the "credit" is replenished and an option exists to pay for a repair or an accessory using the same account. *Any transaction can be made to fit these parameters.*

Realizing the possibility of this result, Congress and the Federal Reserve Board established a comprehensive reasonableness test that requires courts to look beneath the surface of the transaction to determine its true nature and purpose. The Seventh Circuit *admitted* that if it had done so, it would have been forced to find in favor of the Benions:

> [I]f such a method of financing big-ticket purchases would be an abuse of the open-end credit provision of the Truth in Lending Act, as we

> may assume it would be, it could be curbed only by changing the regulatory scheme, for example by specifying a minimum ratio of subsequent purchases to original purchases.

App. 5-6. The Seventh Circuit, displeased that no bright-line test existed, tossed the question back to the FRB and implicitly demanded a different test.

Creditors' abuse of open-end credit is not merely a nuisance or a technical violation of TILA—the consequences to consumers are enormous and far-reaching, particularly for low-income consumers. Already, industry publications are hailing the Seventh Circuit's opinion as a milestone that signifies new freedom for lenders to sell everything from vinyl siding to automobiles using so-called "credit cards."

Before the Seventh Circuit's opinion, lenders had to be careful. They had to make sure that any credit transactions that were documented as open-end credit fell within the spirit and purpose of the Truth in Lending Act's purposely-broad reasonableness test. Now, lenders will design (and are already designing) contracts for large, one-time purchases that do not disclose the number of payments, the amount of finance charges, or even the length of time needed to pay off the debt. Consumers like the Benions will now be faced with "credit" accounts for home improvements or other big-ticket items that could stretch for *decades*. TILA's open-end disclosure requirements, intended to avoid this result, will be completely powerless to make the slightest difference.

CONCLUSION

For all the reasons stated in their Petition for a Writ of Certiorari and this Reply in Support of Petition, Harry Benion and Patricia Benion respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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